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No. 90-6113
IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RANDALL D. WHITE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The Corporation Counsel of the City of New York generally acts as the presentment agency of juvenile delinquency petitions in Family Court in the City of New York. See N.Y. Family Court Act, §§ 254; 301.2.

The Corporation Counsel prosecutes juveniles between the ages of 7 to 13-years old in Family Court for acts which, if committed by an adult, constitute the crimes of Rape in the first degree, Sodomy in the first degree, and Aggravated Sexual Abuse in the first degree. See N.Y. Penal Law, §§ 130.35, 130.50, 130.70.[1] The Corporation Counsel also prosecutes youths between the ages of 7 to 15-years old in Family Court for acts constituting the crimes of Aggravated Sexual Abuse in the second degree, Rape in the third degree, Sodomy in the third degree, and Sexual Abuse in the first through third degrees, id., §§ 130.67,

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[1]With respect to youths between the ages of 14 to 15-years old, they may be prosecuted as designated offenders in Family Court or as adult juvenile offenders in Supreme Court, by the Office of the District Attorney. See N.Y. Family Court Act, §§ 254-a, 301.2(8).

130.25, 130.40, 130.65, 130.60, 130.55, and the crimes of Attempted Rape, Attempted Sodomy, Attempted Sexual Abuse, and Sexual Misconduct. Id., §§ 110.00, 130.35, 130.25, 130.50, 130.40, 130.20. As in criminal cases, the burden of proof required in all juvenile delinquency fact-finding hearings is "proof beyond a reasonable doubt." N.Y. Family Court Act, §342.2(2).

In 1989, the Family Court Division of the Office of Corporation Counsel established a special Sex Crimes Prosecution Unit to handle the growing number of cases involving arrests of juveniles for rape and other serious sex offenses committed by juveniles, often in the home, the neighborhood, or in the schools. According to State statistics, sex crime arrests for youths age 17 and younger, totaled 634 in 1988, up 19 percent from 531 arrests in 1986, and the arrests of youngsters for

forcible rape rose to 266 in 1988, a 27 percent increase over 1986. Indeed, in 1988, children age 12 years old and younger were arrested more often than 13 and 14-year olds for sex crimes, including forcible rape. See DeStefano, Youth Sex-Crime Rate on Rise, N.Y. Newsday, April 7, 1989, p. 7.

As a result, and due to the populous jurisdiction of the five boroughs of the City of New York, the Corporation Counsel is one of the largest prosecutors of sex crimes in the country.

The high cost to society to care for victims and perpetrators of sexual abuse and crimes, which often continues into, if not throughout, their adult lives, cannot be disputed. By aggressively trying to intervene when an individual is young, the Corporation Counsel and the City of New York hope to rehabilitate youthful sex

offenders and thereby to avoid repetition of such heinous acts and crimes.

Accordingly, the City of New York and its Corporation Counsel have a great interest in the Sixth Amendment standards to be applied in such cases. This is particularly true since we are often dealing with the youngest of the victims, as well as the youngest of the perpetrators.[2]

SUMMARY OF ARGUMENT

In the instant case, petitioner's Sixth Amendment right to confrontation was not

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[2]As a separate matter, in civil child protective proceedings, the New York City Human Resources Administration, acting as a child protective agency through designated Special Assistant Corporation Counsels, may file Family Court Act, Article X, child protective petitions as to child abuse and neglect, including sexual and physical, by parents or lawful guardians. See N.Y. Family Court Act, §1011 et seq. The standard of proof in these civil Article 10 fact-finding hearings is by a preponderance of the evidence. Id., §1046(b)(i).

violated by the introduction at trial of the hearsay statements of the four-year old child victim, where such statements fell within the well-established excited utterance/ spontaneous declaration exception to the hearsay rule. We submit that in Maryland v. Craig, 497 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) and Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), which were decided after the Illinois appellate decision in this case, this Court did not change this important, "firmly rooted" hearsay exception, with its exceedingly strong indicia of reliability. Under the circumstances of this case, where the statements of the four-year old girl were fresh and made in response to a startling event, there need be no showing of unavailability of the witness by the prosecution, and certainly no per se rule requiring a showing of necessity should be

established. For the same reasons, the statements made by the four-year old girl to the treating medical personnel were also properly admitted into evidence, as statements made to medical personnel for purposes of treatment.[3]

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[3]In this brief, the City will only address the question of whether the two "firmly rooted" hearsay exceptions at issue herein require a showing of unavailability, and not the factual issues of what such a showing requires or whether such a showing was established in the instant case, i.e., that the prosecution made a "good-faith effort to produce the witness or demonstrate her unavailability". Ohio v. Roberts, 448 U.S. 56, 74 (1980). See also Idaho v. Wright, supra, 497 U.S. at ___, 111 L.Ed.2d at 652 (case did "not raise the question of whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child witness is unavailable at trial -- and, if so, what that showing requires").

ARGUMENT

THE CONFRONTATION CLAUSE IS NOT VIOLATED AND THERE NEED NOT BE A SHOWING OF UNAVAILABILITY WHERE THE STATEMENTS OF THE FOUR-YEAR OLD VICTIM OF SEXUAL ABUSE FELL WITHIN "FIRMLY ROOTED" EXCEPTIONS TO THE HEARSAY RULE FOR EXCITED UTTERANCES OR SPONTANEOUS DECLARATIONS, AND FOR MEDICAL TREATMENT.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. It is applicable to the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403-406 (1965); U.S. Const. Amend. XIV.

The right of confrontation embodied in the Sixth Amendment has never been regarded as absolute, but rather in certain cases must give way to competing interests in the criminal trial process. Mattox v. United States, 156 U.S. 237 (1895).

Maryland v. Craig, 497 U.S. ___, ___, 110 S.Ct. 3157, ____, 111 L.Ed.2d 666, 679-680 (1990) (Confrontation Clause permits, where necessary, the admission of certain hearsay statements despite the defendant's inability to confront the declarant at trial). Cf. Michigan v. Lucas, ___ U.S. ___, 111 S.Ct. 1743, 1747-1748 (1991) (Sixth Amendment "not so rigid" so as to prohibit preclusion, in certain circumstances, of probative evidence based on failure to comply with rape-shield statute or valid discovery rules). For, if taken literally, the Confrontation Clause would mean that no out-of-court statements could be admitted against a criminal defendant unless the defendant had the opportunity to cross-examine the declarant. Mattox v. United States, supra, 156 U.S. at 243. Ohio v. Roberts, 448 U.S. 56, 63 (1980).

Accordingly, this Court has "attempted to harmonize the goal of the Confrontation Clause, placing limits on the kinds of evidence that may be received against a defendant" and the "functional purpose" of an opportunity for cross-examination, "with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements." Bourjaily v. United States, 483 U.S. 171, 182 (1987). See also Kentucky v. Stincer, 482 U.S. 730, 737 (1987).

In Ohio v. Roberts, 448 U.S. 56 (1980), with respect to admission of out-of-court statements in the form of prior testimony, this Court required the prosecution, "as a general matter only," to demonstrate both: (1) the unavailability of the declarant, and (2) that the statement "falls within a firmly rooted hearsay exception." Id. at 65. The Court noted,

however, that "[a] demonstration of unavailability" is not always required. Id. at 65 n.7.

Thereafter, this Court held in United States v. Inadi, 475 U.S. 387 (1986), that unavailability is not required when the hearsay statement is the out-of-court declaration of a co-conspirator. Id. at 392-400. This Court stated that Ohio v. Roberts did not "stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable." Id. at 392-394. Rather, the Ohio v. Roberts unavailability requirement was applicable only when the hearsay statement is a weak substitute for in-court testimony, not when the statements have "independent evidentiary significance" different from that provided by in-court testimony. United States v. Inadi, supra, 475 U.S. at 394. See also Bourjaily

v. United States, supra, 483 U.S. at 182-183.

In Idaho v. Wright, 497 U.S. ___, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), this Court used the Ohio v. Roberts "approach" in evaluating the admission of an out-of-court statement of an unavailable child, which was admitted under a statutory "residual hearsay" exception. The Court held that, under all the circumstances therein, particularly the fact that it was not a "firmly rooted" exception and lacked "indicia of reliability," there was a Confrontation Clause violation. Id., 111 L.Ed.2d at 652.

A. Excited Utterances/Spontaneous Declarations.

In contrast, the instant case involves excited utterances or spontaneous declarations which, in addition to dying declarations, see Mattox v. United States, supra, are one of those categories of "firmly

rooted" hearsay evidence, Coy v. Iowa, 487 U.S. 1012, 1021, and 1033 n.6 (1988), citing Bourjaily v. United States, supra, 483 U.S. at 183, admissible without a case-specific inquiry or showing of unavailability.

Due to their "superior trustworthiness" and of their "... being better than is likely to be obtained from the same person upon the stand," a necessity arises for allowing the use of spontaneous declarations even though they are hearsay statements. 6 Wigmore on Evidence, §1748, p. 199 (Chadbourne Rev., 1974). The special justification for exempting such statements from cross-examination stems from the circumstances in which they were given, i.e., "in the stress of nervous excitement the reflective faculties may be stilled and the utterance become the unreflecting and sincere expression of one's actual impressions and belief." Id. According to

Wigmore, "[i]t follows that the death, absence, or other unavailability of the declarant need never be shown under this exception -- a proposition never disputed (emphasis added)." Id., p. 199.

As far back as 1869, in Insurance Co. v. Mosley, 75 U.S. (8 Wall.) 397, 408 (1869) (hereafter Mosley), this Court stated:

> The res gestae are the statements of the cause made ... almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress.... Rightly guarded in its practical application, there is no principle in the law of evidence more safe in its results.... In the ordinary concerns of life, no one would doubt the truth of these declarations, or hesitate to regard them, uncontradicted, as conclusive. Their probative force would not be questioned. Unlike much other evidence, equally cogent for all the purposes of moral conviction, they have the sanction of law as well as of reason.

See Martinez v. Sullivan, 881 F.2d 921, 928 (10th Cir. 1989), cert. denied sub nom.

Martinez v. Tansy, ___ U.S. ___, 110 S.Ct. 740 (1990) (citing Mosley with approval and endorsing "excited utterance" exception as firmly enough rooted in our jurisprudence so that reliability can be inferred within the rationale of Roberts); Puleio v. Vose, 830 F.2d 1197, 1206 (1st Cir. 1987), cert. denied, 485 U.S. 900 (1988) (citing Mosley and "long and storied" English common lineage and holding that a special evidentiary treatment accorded to spontaneous exclamations is ... "steeped in our jurisprudence"); People v. Brown, 70 NY2d 513, 517 (1987) (citing Mosley).

More recently, this Court explained in Idaho v. Wright, supra, that "[t]he basis for the "excited utterance" exception ... is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and therefore the circumstances surrounding the

making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." Id., 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 655 (citations omitted).

Indeed, even though some members of this Court have expressed the view that the Confrontation Clause requires "face-to-face" confrontation when a child witness actually testifies at trial, Maryland v. Craig, 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 689 (dissenting opinion by Scalia, J.), there has been universal recognition that "there are, after all, many exceptions to the Confrontation Clause's hearsay rule." Id., 111 L.Ed.2d at 690. Also continually endorsed is the principle that there are valid exceptions to the Ohio v. Roberts "general requirement of unavailability" of the declarant, including that of statements by

co-conspirators, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances" in which [they were made." Id. at 691, quoting United States v. Inadi, supra, 475 U.S. at 395.

In the instant case, petitioner conceded that at least one type of the five sets of out-of-court statements, i.e., those made to the babysitter after the child screamed and the babysitter went up to the bedroom and saw petitioner, who was in the house without permission, leaving the bedroom, met the criteria for admission as spontaneous declarations. People v. Randall White, 198 Ill.App.3d 641, 555 N.E.2d 1241 (4th Dist.), pet. for leave to app. denied, ___ Ill. ___, 561 N.E.2d 705 (1990), cert. granted, ___ U.S. ___, 111 S.Ct. 1681 (1991). He contends nonetheless that the prosecution must either produce the child for

cross-examination or demonstrate the child's unavailability under Ohio v. Roberts, supra (see Pet. br., passim). This argument should be rejected since, as demonstrated above, the excited utterance/spontaneous declaration exception is "steeped in our jurisprudence." Bourjaily v. United States, 483 U.S. at 183. Even the Roberts decision upon which petitioner relies so heavily, notes that "[a] demonstration of unavailability" is not always required. Id., 448 U.S. at 65 n.7.

The admission of such statements under this exception is crucial, especially in a case such as this one where the four-year old victim was likely incompetent to testify. See, e.g., United States v. Nick, 604 F.2d 1199, 1202 (9th Cir. 1979) (three-year old "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years," yet

his statements were admissible in criminal proceeding under the spontaneous declaration exception); Jones v. United States, 231 F.2d 244 (D.C. Cir. 1956) (five-year old was incompetent to testify as a witness but statements to her mother were admissible as spontaneous declarations in criminal proceeding).

See also Annotation, Admissibility of Testimony Regarding Spontaneous Declarations Made By One Incompetent to Testify at Trial, 15 A.L.R. 4th 1043 (1982). Cf. Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988), reh. and reh. in banc denied (fact that four-year old girl was presumably incompetent to testify did not bar admissibility of her out-of-court statements as excited utterances in civil damages lawsuit for alleged sexual abuse).

In fact, Dean Wigmore finds that the principle of the excited utterance and

spontaneous declaration exception "obviates the usual sources of untrustworthiness" in childrens' testimony. 6 Wigmore on Evidence, supra, §1751, p. 223.

In addition to the common-law exception, Rule 803(2) of the Federal Rules of Evidence expressly provides that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Fed. R. Evid. 803(2) (emphasis added); see 4 J. Weinstein & M. Berger, Weinstein's Evidence, ¶803(2)(01) (1990 Ed.). The rule has been adopted verbatim in at least 22 states, with several more states adopting extremely similar rules. See id., ¶ 803(2)(02), pp. 803-96--803-103, for compilation of state statutes.

Rule 803 of the Federal Rules of Evidence "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." J. Weinstein & M. Berger, Weinstein's Evidence, p. 803-33 (1990 Ed.).

Petitioner evidences a fundamental misconception when he speaks of this exception as a "shield [for] the child witness from the trauma of testifying." See Pet. br., pp. 19, 28-32. Petitioner does not even address the evidentiary values behind the exception, but merely states that the rationale for the exception is not the same as for co-conspirator statements (Pet. br., pp. 26-28). The long-standing significant evidentiary purposes that this exception

serves cannot be reduced or dismissed in such a manner. Ante, pp. 13-21.

In fact, the "shield" devices petitioner discusses are at issue only when a child actually testifies at trial. As part of the growing recognition of the serious pervasive problem of sex abuse of children, this Court is well aware that state legislatures have devised various alternatives to ease the trauma for when a child testifies in open court. See Coy v. Iowa, supra, 487 U.S. at 1022-1023 (concurring opinion by Justice O'Connor); Maryland v. Craig, supra, 497 U.S. at ___, 110 S.Ct. at ___, 111 L.Ed.2d at 683-684. For example, in the State of New York, these alternatives include the use of videotaping under limited circumstances, see N.Y. Crim. Proc. Law, §109.32, and the use of closed-circuit television under limited circumstances. Id., Art. 65.

The existence of such possibilities, however, does not, as petitioner suggests in his brief (Pet. br., pp. 30-32), give any substance to any abrogation of the "firmly rooted" utterance/spontaneous declaration exception. If, for all the above well-recognized reasons, the use of such evidence is warranted because it is, in fact, often the best evidence, the use of devices fostered to cope with the difficulties of children testifying in open court is not dictated.[4]

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[4]In fact, one commentator has suggested that the valuable purposes of admitting a child's out-of-court statements under this exception may be limited because some courts have taken an overly-restrictive view of when a child's, as opposed to an adult's, statements fit within the contours of the exception. See Yun, J., A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745, 1755-1759 (1983).

Moreover, as the Court below noted in its decision, People v. Randall White, supra, 198 Ill. App.3d. at 660, 555 N.E.2d at 1253, even though Illinois has a separate and newer statutory exception to the hearsay rule for statements by child sex abuse victims, see Ill. Rev. Stat. ch. 38, §115-10 (1987), the instant case does not involve that relatively new and not yet "firmly rooted exception." Cf. Myatt v. Hannigan, 910 F.2d 680, 683-685 (10th Cir. 1990) (because Kansas child hearsay statute was not a "firmly rooted hearsay exception," it required establishing on a case-by-case basis both "adequate indicia of reliability" and "particularized guarantees of trustworthiness"). Cf. Idaho v. Wright, supra (overturning admission of 2½-year old child's out-of-court statement under State of Idaho's "residual hearsay" exception, which is not a firmly rooted exception for

Confrontation Clause purposes and there was no showing of trustworthiness or reliability); Dutton v. Evans, 400 U.S. 74 (1970) (plurality opin.) (reliability inquiry required when evidentiary rule deviates from common-law approach).

In sum, for all these reasons, the excited utterance/spontaneous declaration exception does not require a showing of unavailability.

B. Medical Treatment Exception.

In Idaho v. Wright, supra, in addition to discussing the basis for the well-established "excited utterance" exception, this Court noted that, similarly, "dying declaration" and "medical treatment exceptions to the hearsay rule" are based on the belief that persons making such statements are highly unlikely to lie. Id., 497 U.S. at ___, 111 L.Ed.2d at 655, citing, inter alia, Mosteller, Child Sexual Abuse and

Statements for the Purposes of Medical Diagnosis or Treatment, 67 N.C.L. Rev. 257 (1989). See McCormick on Evidence, §292 (3rd Ed., 1984).

In this case, an Illinois statute, Ill. Rev. Stat. ch. 38, §115-13 (1987), codifies this long-standing, "firmly rooted" medical treatment exception. There is thus no conflict with Idaho v. Wright, supra (see Pet. br., p. 22, n.3), which addresses a separate, statutory "residual hearsay" rule, and, indeed, expressly recognizes the medical treatment exception. So too, Rule 803(4) of the Federal Rules of Evidence provides a hearsay exception for statements made for the purpose of medical diagnosis or treatment, regardless of the availability of the declarant. Fed. R. Evid. 803(4). J. Weinstein & M. Berger, Weinstein's Evidence, pp. 803-36, ¶ 803 (4)[01], pp. 803-143--803-151 (1990 Ed.); State v. Ochoa,

576 F.2d 854, 855-858 (Fla. 3rd Dist. Ct. App. 1991) (distinguishing between medical treatment exception and statutory residual hearsay exception as in Idaho v. Wright). Cf. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

Accordingly, the statements to the nurse and doctor were properly admitted under this exception.

C. **Summary.**

In conclusion, the two "firmly rooted" hearsay exceptions here serve society's long-standing interest in accurate fact-finding, without violating the Confrontation Clause. For all the above reasons, therefore, the City of New York respectfully urges this Court to affirm the order below.

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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